

EXHIBIT 1

1 IN THE UNITED STATES DISTRICT COURT

2 IN AND FOR THE DISTRICT OF DELAWARE

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4 CVIN LLC (d/b/a VAST NETWORKS) a : CIVIL ACTION
California Limited Liability Company,

5 Plaintiff, :
v :
6 CLARITY TELECOM, LLC (d/b/a VAST :
BROADBAND), a Delaware Limited :
Liability Company; and DOES 1-100, :
8 : NO. 17-417-LPS
Defendants.

9 - - -

10 Wilmington, Delaware
11 Monday, October 2, 2017
12 Oral Argument Hearing

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14 BEFORE: HONORABLE LEONARD P. STARK, Chief Judge

15 APPEARANCES: - - -

16 RICHARDS, LAYTON & FINGER, LLP
17 BY: KELLY E. FARNAN, ESQ., and
NICOLE K. PEDI, ESQ.

18 and

19 COBALT, LLP
20 BY: VIJAY K. TOKE, ESQ.
(Berkeley, California)

21 Counsel for Plaintiff

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Brian P. Gaffigan
Registered Merit Reporter

1 APPEARANCES: (Continued)

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 3 DEVLIN LAW FIRM, LLC
 BY: JAMES M. LENNON, ESQ.
 4
 5 and
 6 ALSTON & BIRD, LLP
 BY: LARRY C. JONES, ESQ.
 (Charlotte, North Carolina)
 7
 8 Counsel on behalf of Defendant
 Clarity Telecom (d/b/a Vast Broadband)
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15 P R O C E E D I N G S

16 (REPORTER'S NOTE: The following hearing was
 held in open court, beginning at 12:08 p.m.)17 THE COURT: Good afternoon. I'll have you put
 your appearances on the record, please.

18 MS. FARNAN: Good afternoon, Your Honor.

19 THE COURT: Good afternoon.

20 MS. FARNAN: Kelly Farnan from Richards Layton &

21 Finger on behalf of the plaintiff. I'm joined at counsel
 table by Vijay Toke from Cobalt and Nicole Pedi from my
 22 office.

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1 MS. FARNAN: Yes, Your Honor. Mr. Toke is going
 2 to handle both motions for us.
 3 THE COURT: All right. Well, I'll allow the
 4 defendants to argue both at the same time, if you wish.
 5 I'll tell you I'm mostly focused on the motion to transfer
 6 but certainly say whatever you like about the motion to
 7 dismiss as well. It's all up to your time limit, of course,
 8 which will start now.

9 MR. JONES: Thank you.

10 Your Honor, this presents a rather unique set of
 11 circumstances at least in my career. I'm sure you have seen
 12 something like this before. But this presents a motion for
 13 transfer and a situation where there is a plaintiff that is
 14 not a Delaware company suing a defendant that is not a
 15 Delaware company -- excuse me -- who is a Delaware company
 16 but who has no business activities or operations in Delaware
 17 and even the plaintiff has no business operations in
 18 Delaware. So the single thread between the activities that
 19 gave rise to this lawsuit and the activities of the parties
 20 is the fact that my client is a Delaware LLC.

21 THE COURT: Well, they say that when your
 22 customers are in Delaware, they can do business with you
 23 from Delaware; is that correct?

24 MR. JONES: That is incorrect, Your Honor. My
 25 client is your standard cable, Internet, telephone

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1 MR. TOKE: Good afternoon.

2 THE COURT: Welcome.

3 MS. FARNAN: And just in terms of proceeding
 4 today, Your Honor, it would be our preference to do one
 5 motion, then the other. I think the defendants would prefer
 6 to move together, so whatever Your Honor's preference is
 7 we'll do.

8 THE COURT: Okay. Thank you.

9 MR. LENNON: Thank you.

10 THE COURT: Good afternoon.

11 MR. LENNON: Good afternoon, Your Honor. Jim
 12 Lennon of the Devlin Law Firm and Larry Jones of Alston &
 13 Bird representing Clarity Telecom, LLC.

14 THE COURT: Thank you. And did Ms. Farnan
 15 accurately represent the defendant's preference as to how
 16 we proceed?

17 MR. JONES: I would rather argue both motions.
 18 There is an overlap in the subject matter of the motion to
 19 transfer and the motion to dismiss in that each deals at
 20 least in part with where the allegedly infringing activities
 21 occurred, and so I'll do it the way you want to do it. I
 22 would prefer to just go from the motion to transfer into the
 23 motion to dismiss the cases.

24 THE COURT: And is the same individual arguing
 25 both motions on the plaintiff's side?

1 combination provider. It is limited by law. It is limited
 2 by local franchise agreements and state laws to servicing
 3 customers with those Internet broadband services only in
 4 parts of South Dakota, Iowa, and Minnesota.

5 If you go to your office, sure, you can access
 6 my client's website, and you may like what you see there,
 7 but when you try to order my client's services, and you input
 8 where you live by zip code or whatever, you will be told:
 9 Sorry, we cannot provide services to you.

10 So Delaware residents are not subject to my
 11 client's advertising or promotion or the provision of its
 12 services. The only thread between my client's activities
 13 and Delaware is the fact that it is a Delaware company.

14 THE COURT: So maybe I wasn't clear. My
 15 understanding is if I was one of your customers, let's say,
 16 in South Dakota and I had occasion to travel to Delaware and
 17 I had some sort of device with me and I wanted to access
 18 the Internet or maybe watch cable TV that I could do that
 19 through you because I'm a customer of yours even though I am
 20 actually in Delaware. Is that true?

21 MR. JONES: That is true. You could access, if
 22 you were a resident, each of those territories and brought
 23 your iPad or iPhone with you. You could utilize the services
 24 while traveling, but you could never get the services initially.
 25 And, as I said, the services would not be advertised and

1 promoted here.

2 So the problem is if you exercise your discretion
 3 and retain venue in this case when there is only that nexus,
 4 the fact that it's a Delaware company to begin with, then
 5 what you are basically saying, with all due respect, is any
 6 Delaware company can be sued under the general venue statute
 7 and venue will rest here for anything that that Delaware
 8 company does anywhere in this country, and I don't think that
 9 comes within the limitations that the courts have put on the
 10 application of the general venue statute.

11 Now, when you look at the general venue statute,
 12 it doesn't tell you a lot definitively. It tells you that
 13 this decision depends upon what you deem to be the convenience
 14 of the parties and the witnesses and the interest of justice.
 15 And then the courts have given you a list of factors which
 16 you are very well familiar with and the plaintiff is trying
 17 to score big points on the very first of the private interest
 18 factors, that is the plaintiffs own preference for the venue
 19 for this lawsuit.

20 However, the plaintiff itself is not even a
 21 Delaware company, and the courts have said that when the
 22 plaintiff is not itself a Delaware company or a company in
 23 the state in which it chose venue, then the plaintiff's
 24 preference is to be given very little deference -- very
 25 little deference. The minimal amount of deference would be

1 MR. JONES: Then you need not weigh that
 2 factor very heavily against us. Maybe we should get some
 3 deference though because there is some inconvenience. It
 4 is anti-convenient, maybe only to a small extent.

5 THE COURT: Well, going back to what weight to
 6 give their preference of Delaware as the forum. I recognize
 7 there are cases that say what you have said, but there are
 8 other cases that say when there is legitimate and rational
 9 reasons for that selection, that it still gets some significant
 10 weight. So I guess, tell me why I shouldn't follow those
 11 cases. And, secondarily, do you dispute that the plaintiff
 12 has legitimate and rational reasons for preferring Delaware?

13 MR. JONES: The reason is it can get away with
 14 it was Delaware is the state of residence of the defendant.
 15 THE COURT: Is that illegitimate or irrational?
 16 MR. JONES: It is permissible. I don't think --
 17 when you talk about whether it is irrational, you have to
 18 consider what are the other factors that go into this
 19 lawsuit? What activities give rise to the infringement
 20 claim?

21 The plaintiff in its own brief says that these
 22 claims arose out of activities in the Clarity service area,
 23 those three states that I mentioned. Plaintiff's own brief
 24 also says that confusion, if it occurred, will have occurred
 25 in that area, the Clarity service area.

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1 appropriate here.

2 The status of our client as a Delaware company
 3 selling products or services which might migrate with its
 4 customers in their service area to Delaware, that only
 5 proves that you may exercise your discretion and retain
 6 venue of the lawsuit, but it does not inform the decision
 7 that the interest of justice, and the convenience of the
 8 parties would be favored by retaining the lawsuit here.

9 In fact, the plaintiff does not, in my opinion,
 10 posit any particular facts that would inform or support
 11 the conclusion that retaining the lawsuit here is for the
 12 convenience of the parties. One party will have to travel
 13 across the entire country for any activity in this lawsuit.
 14 One party will have to travel halfway across the country for
 15 trial or activity. It is not convenient to travel twice as
 16 far even though you don't have to do it very many times. So
 17 you can't say their choice of venue here is promoting the
 18 convenience of the parties.

19 THE COURT: Aren't we essentially talking
 20 about traveling I guess from California to St. Louis or
 21 Philadelphia? Isn't that what it pretty much comes down to?

22 MR. JONES: I think so.

23 THE COURT: So on what basis could I conclude
 24 that there is any real material difference other than
 25 another hour or hour and-a-half I suppose in the air?

1 From trying trademark lawsuits, plaintiff's
 2 counsel knows, as do I and as does the Court, that if there
 3 is a survey to vet the issue of the likelihood of confusion,
 4 the survey has to be directed to the customers or potential
 5 customers who are subjected to the allegedly infringing
 6 activities. You are not going to be conducting -- we're
 7 not going to be conducting, that is, a survey of people in
 8 Delaware because I'm confident that you would not consider
 9 that to be probative of whether the people in the Clarity
 10 service area are likely to be confused when exposed to the
 11 Vast trademark.

12 THE COURT: But, of course, you are not going to
 13 do it in the Eastern District of Missouri either, so what
 14 relevance does that have that you are not asking to transfer
 15 the case to where the claim arose, where the confusion would
 16 arise?

17 MR. JONES: There are third-party witnesses
 18 apparently that the plaintiff is going to count on, and it
 19 says so in its brief.

20 I'm sorry. I'm having some vision troubles this
 21 morning.

22 THE COURT: Are you okay? Do you need a break?
 23 MR. JONES: No, no. I, I ...
 24 THE COURT: If you are okay, you need not
 25 explain.

1 MR. JONES: I spent most of the night on the
2 telephone with American Airlines trying to find this suit.

3 THE COURT: Oh, I'm sorry to hear that.

4 MR. JONES: My eyes are tired this morning. I
5 am having trouble.

6 So, no, the survey would be targeted at the
7 residence within that geographic territory in the Midwest,
8 which is a very short distance from the Eastern District
9 of Missouri.

10 THE COURT: So it may be more convenient. I
11 hear that. I guess the larger point, though, is you face a
12 heavy burden. You don't dispute that. It's the law here
13 in the Third Circuit. And one of the things that makes
14 this not quite unique but interesting is that a lot of the
15 factors you point to, to say why Delaware is not convenient,
16 point towards a District that you don't want to go to. You
17 want to go to where you are physically located, but that is
18 not where your company operates.

19 MR. JONES: Then the Court may exercise its
20 discretion and transfer this lawsuit to a nearby District
21 within Iowa, Minnesota, or South Dakota if the Court thinks
22 that that is more rational and would be more convenient
23 for the parties and the witnesses. And as I said, the
24 plaintiff, in its own brief, says that there are witnesses
25 in our service area.

1 legal standards is activity that occurred in North Carolina
2 where those doughnuts were made.

3 The fact that a defendant's product will migrate
4 across the country from time to time as people put things in
5 their car or their bags such as their iPads and iPhones is of
6 no particular consequence, Your Honor. And the courts have
7 made it very clear that it is of no particular consequence
8 that you can access an Internet website from anywhere in this
9 country, or anywhere in the world. That does not play in the
10 rational analysis of what is convenient for the third-party
11 witnesses and what is in the interest of justice.

12 That is outside I submit the legitimate interest
13 of justice to subject a defendant that is a localized business
14 to venue having to defend a lawsuit by a company that is a
15 West Coast company, operates only in the Fresno, California
16 area who chooses to sue in Delaware for some reason.

17 And I think I know what the reason is, but that
18 doesn't come into the analysis. Their reason doesn't come
19 into the analysis. At least, the reason I'm thinking of
20 doesn't come into the analysis. They can justify their choice
21 because the law says they can sue us here.

22 THE COURT: Your client chose to be a Delaware
23 entity. It's hard to be persuaded by the argument that it's
24 against the interest of justice for them to be sued in the
25 very state where they chose for whatever reason they chose

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1 I would also point out that in the plaintiff's
2 brief, they say at page 13, "trademark infringement claims
3 are deemed to arise where the passing off occurs or where
4 the allegedly infringing products are sold to customers who
5 may be confused."

6 They know that the heart of this lawsuit is what
7 is going on when my client uses Vast to sell, offer to sell,
8 and provide those services.

9 That activity, if not in sight to Missouri, is
10 close by, in one of the nearby states. The activities that
11 are conducted by the folks on the ground are managed from
12 Sikeston, Missouri in the Eastern District of Missouri. The
13 decision to document the allegedly infringing mark was made
14 by the officers in Sikeston, Missouri using the services of
15 a branding company that is based in the Eastern District of
16 Missouri.

17 So there is a strong factual nexus between the
18 operative facts of this lawsuit and Missouri and its nearby
19 geographic areas. There is no such nexus with Delaware.

20 And, again, I point out that you can buy, if
21 you go down and buy -- if I bought doughnuts from a local
22 doughnut shop in North Carolina before I left yesterday and
23 came up here to Delaware and ate them for breakfast this
24 morning and got ill, I may have gotten ill in Delaware but
25 the activity that has to be analyzed and is subjected to

1 to become an entity.

2 MR. JONES: Then I submit, Your Honor, that
3 what this Court would be saying to the world is any of the
4 gadzillion Delaware LLCs and corporations may be sued by
5 anyone in this country in Delaware for any cause of action
6 that does not have its own special venue statute, such as
7 the patent venue statute, but for those causes of action
8 which are controlled by the general venue statute, then such
9 a ruling would be saying that the doors of this courthouse
10 are not only welcoming, we're going to retain every lawsuit
11 against every Delaware corporation filed for any reason by
12 anybody from anywhere about activities conducted anywhere.

13 That is eviscerating the standard of the
14 convenience of the parties and the interest of justice.
15 That is saying, no, the determining factor was the defendant
16 a Delaware LLC or a Delaware corporation. That is not
17 dispositive of the issue.

18 THE COURT: Well, it wouldn't necessarily, and I
19 would not intend it at least to be that that is dispositive,
20 but as you have acknowledged, it is the law permits them to
21 sue your client here. That triggers an analysis under *Jumara*
22 where the burden is very much on you, and it is a heavy burden
23 under the case law, and it requires the Court to do a fact
24 specific analysis as to the interest of convenience. And
25 here, among other things, you chose to ask me to analyze a

1 preference of a District which is not the one where the case
 2 arose, so I'm not sure that a decision to deny your motion
 3 could reasonably be spun in the way you are arguing.

4 MR. JONES: Well, Your Honor, you may transfer
 5 it to any jurisdiction where the case may have been brought.
 6 While my client is not a Minnesota, Iowa, or South Dakota
 7 corporation, another venue statute -- excuse me -- another
 8 statute says that the claim could be brought where the cause
 9 of action arose, so you may transfer the case to one of those.

10 THE COURT: Sure. But the *Jumara* factor is the
 11 defendant's preference, and at least up until this discussion,
 12 my understanding was your preference was the Eastern District
 13 of Missouri, and that is what I am focused on.

14 MR. JONES: I apologize. I do think that there
 15 is a strong nexus with the Eastern District of Missouri,
 16 more so than with either of those other three individual
 17 areas. Part of the operations which are managed by Missouri
 18 people in the Missouri office occur in each of those three
 19 states, but the core of the company, the location of the
 20 direction of the company, the location of where the choice
 21 was made to undertake this brand of three years ago, all
 22 of that was in Missouri. So we chose to ask for it to
 23 be transferred to Missouri because we think Missouri is
 24 more sufficiently or more significantly connected to the
 25 operative facts than either South Dakota, Iowa, or Minnesota.

1 in the outcome of the case. And I would submit this being a
 2 trademark infringement case in which the Court is ostensibly
 3 protecting the customers from confusion, it is the consumers
 4 who are in or near Missouri that the Court is to protect.
 5 It has no particular interest in protecting the consumers of
 6 Delaware because we are not lawfully allowed to come here.

7 With respect to the statutory claims, the motion
 8 to dismiss, they are basically claims that sound in trademark
 9 infringement. And as I mentioned earlier, for the reason that
 10 the activities, the operative activities that give rise to
 11 these claims are not affecting Delaware consumers, then the
 12 consumer protection statute should not apply to what my client
 13 does in South Dakota, Iowa, and Minnesota from operations
 14 managed in Missouri. That is not anything that remotely
 15 affects Delaware residents and businesses.

16 Thank you.

17 THE COURT: That's it? Okay. We'll save your
 18 time for rebuttal.

19 Now we'll hear from plaintiff.

20 MR. TOKE: Good afternoon, Your Honor. I'll,
 21 of course, address the motion to transfer first.

22 As the Court noted, the defendant bears the
 23 burden in a motion to transfer. It is a heavy burden. The
 24 Third Circuit and this Court have repeatedly ruled that.

25 And Clarity has failed to meet that burden.

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1 But if you consider the factor, if you consider that South
 2 Dakota, Iowa and Minnesota are, their activities there are
 3 relevant, then that, too, would support a conclusion that
 4 the venue for the case will be more convenient for all those
 5 people in Missouri than in Delaware.

6 Are there any other particular *Jumara* factors
 7 that the Court would like to question me about?

8 THE COURT: That's entirely up to you.

9 MR. JONES: I do think that where the claim
 10 arose has to be considered to be a very, very significant
 11 factor. And I do think that undoubtedly that weighs heavily
 12 in favor of the transfer to the Midwest, be it Missouri or
 13 one of those other areas, because that is no doubt where the
 14 claim arose. That is where the idea was given birth. That
 15 is where it was adopted. That is where the activities had
 16 been managed.

17 So that factor definitely weighs heavily in our
 18 favor whereas the plaintiff's choice, because it's not even
 19 a Delaware company, is to be given little deference. So if
 20 you are scoring points, and you are not supposed to score
 21 points, I know, but that is a significant factor that
 22 undoubtedly weighs in our factor.

23 Some of these others are more or less neutral.

24 I will say this. There is a public interest
 25 factor that deals with the interest of the respective fora

1 I'll first turn to the issue of the plaintiff's
 2 -- the deference of the plaintiff's decision to sue here in
 3 the District of Delaware.

4 While it's true that there are some cases from
 5 this District that indicate that where a plaintiff has
 6 chosen to sue here but is not on its home turf, that that
 7 decision is entitled to some lessened deference, but it
 8 seems to me that the exception to the exception is where
 9 there is some rational basis for that choice. Here, that
 10 rational basis is eight.

11 First, the fact that the defendant here is
 12 incorporated in Delaware is a rational basis for filing
 13 here.

14 And the discussion the Court just had with
 15 Mr. Jones underscores exactly why this was the best choice
 16 for venue. The fact is, our home turf of California, as we
 17 indicated in our opposition papers, we weren't clear whether
 18 or not we would have personal jurisdiction over the
 19 defendant. Therefore, we had to choose some other District.

20 Now, as Mr. Jones has indicated, the service
 21 area is in three separate Districts and the headquarters are
 22 in yet a fourth state. These are separate and disparate
 23 areas which left us with the quandary of which District do
 24 we go to?

25 Well, the easiest District then and most logical

1 District then was the state of incorporation. The law
 2 allows us to sue here, and that rational decision allowed us
 3 to place in one District this case versus having to choose
 4 between several Districts that have service areas that fall
 5 within the service area of the defendant or where they were
 6 headquartered. That is a rational basis for suing here.

7 Moreover, this Circuit and this District sees a
 8 lot more IP cases than the Eastern District of Missouri and
 9 has a well developed and stable case law in that area. All
 10 rational bases for suing here in the District of Delaware.
 11 As a result, that decision should receive extreme deference,
 12 not the little deference that Clarity suggests.

13 Turning then to the joint factors themselves.

14 I'll first start with the private factors, the
 15 convenience of the parties. This Court has repeatedly noted
 16 that we don't look to the convenience of the parties, of the
 17 witnesses for discovery. That is a local event. But for
 18 trial, Clarity has not identified a single witness who could
 19 not travel to, would not be available at trial. They have
 20 not met their burden.

21 Secondly, with regard to documents. With
 22 technological advancements today, documents even if located
 23 in Missouri or Iowa or wherever are not difficult to produce
 24 at trial here. Once again, Clarity has not met its burden.

25 With regard to the public factors. By Clarity's

1 Mr. Jones mentioned, this is not a regional type of business
 2 as we have got, the defendant here is located in Missouri
 3 and headquartered. It doesn't have a single -- it doesn't
 4 have a service area there. As the Court noted, the survey,
 5 if any survey was done, it wouldn't be done in Missouri, it
 6 would be done in Iowa, probably South Dakota and Minnesota.
 7 As a result, the District of Missouri isn't the most
 8 convenient at all.

9 Really what this is, is an attempt to try to go
 10 to its own home turf on a case that frankly has already been
 11 decided with regard to the cornerstone of the likelihood of
 12 confusion analysis by the Trademark Trial and Appeal Board.
 13 This Court would not be burdened by this type of a case, a
 14 Lanham Act case which, generally speaking, isn't as heavily
 15 litigated as a patent case. There is not as much motion
 16 practice typically, and we have a potential res judicata
 17 under *B&B Hardware* under the Supreme Court precedent based
 18 on the Trademark Trial and Appeal Board's decision on the
 19 likelihood of confusion. This is just an attempt to try
 20 to go to their headquarters, not necessarily where the
 21 infringing activity occurred.

22 We also do allege that because they're
 23 Delaware corporations that Clarity does business with, the
 24 infringement has occurred here in Delaware as well as any
 25 other place where a company that they have done business

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1 own admission, most of the factors are neutral or do not
 2 favor transfer.

3 With regard to the public policy, this District
 4 and the Delaware courts do have an interest in adjudicating
 5 federal claims like Lanham Act claims that can affect Delaware
 6 corporations, as we have alleged in the complaint. A number
 7 of our client's customers, not their local customers but the
 8 national customers, are large corporations, many of which are
 9 Delaware corporations.

10 We have also alleged by implication that a
 11 number of the defendant's customers, which are the same large
 12 companies as our client caters to, are Delaware corporations.
 13 And with a little sleight of hand in their opening papers as
 14 well as their reply papers, they suggest, well, we don't have
 15 any customers that have a billing address in Delaware. That
 16 the clear implication of that is that they have Delaware
 17 corporations that they do business with. As a result, this
 18 Court absolutely has a local interest.

19 Moreover, this Court has also noted that when
 20 dealing with federal statutes like the Patent Act or the
 21 Lanham Act, the interest is national, and that does not
 22 necessarily mean that the District Courts here in Delaware
 23 don't have a rational or a public interest in adjudicating
 24 those cases.

25 With regard to some of the other points that

1 with is located or is otherwise incorporated. So the
 2 complaint does encompass allegations with regard to all
 3 those things.

4 THE COURT: There is no evidence of advertisements
 5 or affirmative use of the trademark here in Delaware, correct?
 6 MR. TOKE: That is true, Your Honor. But as we
 7 noted, there is the ability to use, for Clarity's customers
 8 traveling throughout the United States, to be able to access
 9 those services from wherever, including Delaware. So it is
 10 true that we, at least currently, don't have any, any
 11 evidence to suggest that there is advertising in Delaware.
 12 We don't know, we obviously haven't conducted discovery, but
 13 we do know that Clarity has done business with Delaware
 14 corporations. So as a result, there may not be advertising
 15 per se, but there certainly is marketing and working to have
 16 sales with companies that do have incorporation here in
 17 Delaware.

18 THE COURT: But as they point out, in today's
 19 world, probably every company has done business with a
 20 Delaware corporation. Address that and the larger point
 21 that defendants suggest you would be sending a dangerous
 22 message if we keep venue in this case.

23 MR. TOKE: This Court's jurisprudence on transfer
 24 is legend. There are cases that have been transferred and
 25 those that haven't. This decision doesn't send a message that

1 Mr. Jones is suggesting. What it suggests, what message that
 2 it will send is that if you choose to incorporate in Delaware
 3 and you have done business with other Delaware business
 4 corporations and you are a multistate company that does
 5 business in multiple states and as a result has a much larger
 6 reach than just say the doughnut shop example that Mr. Jones
 7 gave, then you are potentially subjecting yourself to federal
 8 claims in Delaware. That is not an onerous obligation for
 9 companies that have chosen to be incorporated and to be
 10 protected under the laws of Delaware.

11 In addition, I will turn, if I may, to the
 12 motion to dismiss, Your Honor.

13 THE COURT: But before you get to that. On the
 14 defendant's preferred forum, which is a factor of course
 15 under *Jumara*, under these circumstances, how do you suggest
 16 I analyze it? And what do I look to as defendant's
 17 preferred forum?

18 MR. TOKE: Well, defendant's preferred forum
 19 should receive very little deference here, Your Honor,
 20 because there is not even the nexus under Clarity's own
 21 admissions. They admit that the nexus of location of the
 22 passing off is where the infringement occurs, and that is
 23 not in Missouri. Their service area isn't even in Missouri.
 24 So, therefore, under their own argument, Missouri isn't
 25 the appropriate location, so it should receive very little

1 The passage in the brief that I was trying to
 2 recall a few minutes ago, and couldn't remember or see it,
 3 was the passage where they say, "there are likely also
 4 witnesses in Iowa, Minnesota, and South Dakota."
 5 I assume that those are actual confusion
 6 witnesses on whom they intend to rely. I don't know. I
 7 don't know who those third-party witnesses are in those
 8 three states, but we'll take plaintiff at his word in his
 9 brief. There are third-party witnesses in the vicinity of
 10 Missouri and the other areas in which this Court could --
 11 to which the Court could transfer this lawsuit.

12 When you consider the convenience of known
 13 third-party witnesses, we don't know their names but we know
 14 that plaintiff says they're there. We have to take the
 15 plaintiff at his word.

16 And then, Your Honor, there was a red herring
 17 thrown into the plaintiff's argument. I want to make sure
 18 the Court understands one aspect of trademark law as it
 19 applies to this case. We did apply, our client did apply
 20 for a federal -- a national registration of Vast broadband,
 21 I think it was, and it was rejected because of the senior
 22 registration of plaintiff.

23 From what the plaintiff's attorney said, you'd
 24 think that was dispositive of the likelihood of confusion.
 25 No, it is not. Under the longstanding *Don's Donuts* rule

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1 deference, if any.

2 THE COURT: You can move on, if you wish.

3 MR. TOKE: With regard to the motion to dismiss,
 4 this isn't just a regional decision matter. The DTPA does
 5 not require that the activities occur within Delaware.
 6 However, there are allegations within the complaint.
 7 Paragraphs 5, 11, 12, and 13 through 16 or 16 through 18
 8 discuss the allegations that include Delaware activities.
 9 But, again, the DTPA doesn't specifically require local
 10 activity in order to have an actual claim unlike the DCFA.
 11 If anything, those discussions of locality or the localness
 12 address the common law and fair competition and trademark
 13 claims, not the DTPA claims.

14 THE COURT: All right. Is there anything else?

15 MR. TOKE: That's it, Your Honor.

16 THE COURT: All right. Rebuttal on the motions?

17 MR. TOKE: Thank you, Your Honor.

18 MR. JONES: Well, now we have it on the table.

19 Now we know what the test is that the plaintiff is espousing
 20 here. If the defendant is a Delaware company and does
 21 business with any Delaware companies, and is subject to
 22 jurisdiction in multiple venues outside of Delaware, then
 23 venue in Delaware is most appropriate.

24 That is not the way to apply Section 1404(a),

25 Your Honor, I submit.

1 which originated in the 30s or 40s, I think, if you are
 2 operating in disparate territories, then even though the
 3 marks might be the same and might be used for the same or
 4 very closely related services, the senior party has no
 5 viable cause of action until the circumstances in the
 6 marketplace are such that there is a collision of the
 7 reputations and the operations of the defendant and the
 8 plaintiff.

9 In this case, when we apply for a national
 10 registration, when my client applied, what they were seeking
 11 was a national registration and the Trademark Office said
 12 you cannot have a national registration which would give you
 13 prima facie evidence of the right to use your mark nationwide.

14 We're not saying we have the right to use it
 15 nationwide. We're saying that at this time, under the
 16 circumstances of the marketplace, our use in those three
 17 states is lawful. So the USPTO's decision on our national
 18 application is not dispositive of the likelihood of confusion
 19 issue, unless the Court otherwise thinks.

20 THE COURT: That is very helpful because as I'm
 21 sure you know, I don't have nearly the breadth of experience
 22 on trademark cases that I do have on patent cases.

23 MR. JONES: And I don't think you need any more,
 24 Your Honor. I'm sure you have plenty to do.
 25 THE COURT: Thank you for that. But it has been

1 suggested by your friend on the other side that while this
 2 is an intellectual property case, I shouldn't expect, if I
 3 were to keep it, that it's going to necessarily be as
 4 litigious as a typical patent case may be. Do you want to
 5 address that?

6 MR. JONES: Nothing is as burdensome to the
 7 participants and the Court as a patent case. I know because
 8 I used to try them until I woke up one morning and had
 9 better sense. Now I will do nothing in the way of patent
 10 cases if I can keep going.

11 No, it's not going to be as complex as a patent
 12 case or not as many rabbit trails to go down as in a patent
 13 case. The likelihood of confusion is a determinative issue,
 14 and that is based on known factors. And there will be
 15 evidence garnered by both sides. There will be surveys,
 16 expert witnesses, but, yes, you can get your arms around a
 17 trademark case more readily than you can get your arms
 18 around a trademark case whether you are on the bench or
 19 being the advocate for either party. I agree with that.

20 THE COURT: Okay. Is there anything else you
 21 want to add?

22 MR. JONES: No, thank you.

23 THE COURT: Is there anything further from
 24 plaintiff?

25 MR. TOKE: If the court would like me to address

1 THE COURT: Thank you.
 2 MR. TOKE: Thank you.
 3 THE COURT: Mr. Jones, you can have the last
 4 word on your motion.
 5 MR. JONES: And with that, the issue is joined
 6 and I submit the issue should be tried in Missouri or one of
 7 those other three states, Your Honor.
 8 THE COURT: Okay. Thank you.
 9 I know we have a proposed scheduling order, and
 10 we might talk about that, but at this point I want to take a
 11 break and see if I can give you any further guidance on
 12 the issues that have already been argued, so we will be in
 13 recess.
 14 (Brief recess taken.)
 15 * * *
 16 (Proceedings reconvened after recess.)
 17 THE COURT: Have a seat.
 18 Thank you for the helpful argument and the
 19 briefing before that. As I said, I was focused on the
 20 motion to transfer, and having given that thought and worked
 21 through it more, I'm prepared to rule on that motion.
 22 So with respect to the defendant's motion to
 23 transfer, the legal standard is clear. The burden, of
 24 course, is on the defendant.
 25 In the Third Circuit, we know that transfer is

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1 the *Don's Donuts* issue, sure, but otherwise ...
 2 THE COURT: It's really up to you.
 3 MR. TOKE: Just briefly, if I might, Your Honor.
 4 THE COURT: Sure.
 5 MR. TOKE: With regard to the *Don's Donuts*
 6 issue raised by Mr. Jones, all that case determines and that
 7 doctrine is about regionality and whether or not someone
 8 with a national registration can stop someone from using
 9 that mark in a remote geographical area. That doesn't mean
 10 there isn't a likelihood of confusion between those two
 11 marks. It's just that they haven't collided yet.

12 So the decision there is a likelihood of
 13 confusion between the two marks is still quite important;
 14 and we would argue that the decision by the TTAB was in fact
 15 dispositive as to that issue. So really the issue here will
 16 be quite narrow in terms of are these geographically remote
 17 or are they actually competitive. And our view, of course,
 18 is there has been actual confusion in the marketplace which
 19 suggests that they are in fact competitive and that they do
 20 overlap even if the actual service areas are geographically
 21 disparate. That we do have an overlapping consumer base,
 22 including the Delaware corporations, that would suggest that
 23 there isn't that *Don's Donuts* problem. But the likelihood
 24 of confusion on the decision of the TTAB is still relevant
 25 and potentially issue preclusive.

1 not to be liberally granted and, in fact, should only be
 2 granted where the balance of convenience of the parties is
 3 strongly in favor of defendant.
 4 Importantly also, the law requires me to
 5 carefully consider each case on its own, applying the law
 6 to the particular facts in each case.
 7 In that regard, I'm not sure that any single
 8 case could ever be said reasonably to be one that should be
 9 interpreted as sending a strong message or a broad message.
 10 Certainly, I don't intend my ruling today to be sending a
 11 broad message of any sort. Instead, I have struggled to
 12 apply the law to the unique and particular facts here.
 13 First, this much is not hard or in dispute. The
 14 parties concede that the Eastern District of Missouri is a
 15 proper venue where this case could have been brought. I
 16 don't know that it is conceded but I find the other three
 17 Districts that have been discussed today, these three where
 18 Clarity operates, which I understand to be South Dakota,
 19 Iowa, and Minnesota, those are also proper venues in which
 20 this case could have been brought.
 21 That just means I need to turn to the tougher
 22 decision of the *Jumara* factors and seeing how they all play
 23 out and what the balance is in the end.
 24 First, with respect to the private factors, we
 25 start with the plaintiff's preference for Delaware as the

1 forum for this case.

2 Obviously, this factor disfavors transfer. In
 3 this case, plaintiff's choice of Delaware was a legitimate
 4 and rationale choice given the quandary they faced; and as
 5 they have described, they were concerned, understandably,
 6 that their home turf of California was not a proper venue,
 7 and they could see, from publicly available information,
 8 that defendant operated in at least three other Districts
 9 and had its headquarter located in a fourth District. They
 10 could, of course, also easily determine that defendant was
 11 incorporated in Delaware and could be confident therefore
 12 that Delaware was at least a proper forum.

13 I do disagree with plaintiff in saying that
 14 therefore their choice under the circumstances is entitled
 15 to extreme deference, but I also disagree with defendant
 16 saying that under the circumstances, plaintiff's choice is
 17 entitled to only little deference.

18 In my view, the amount of deference, the amount
 19 of weight is somewhere between those two endpoints and so in
 20 my view, the plaintiff's choice of forum of Delaware gets
 21 substantial weight in the balance here.

22 An interesting wrinkle I think that was
 23 presented by this case is whether or not defendant is a
 24 truly regional company. Some of the cases discuss how much
 25 weight the plaintiff's choice of forum would be given in a

1 with a company that really directs its business to Delaware.
 2 So all of that to me means that the weight to be
 3 given to plaintiff's choice of forum, again, it's substantial
 4 but it's reduced somewhat by what the defendant's business
 5 operations and character is. And so we're not down to little
 6 deference, but again we're far from extreme deference.

7 I now turn to the defendant's choice of forum.
 8 Until today, the defendant's preference was sole
 9 the Eastern District of Missouri. That is what I analyzed
 10 coming in here. And I think it's fair to continue to
 11 evaluate Delaware against the Eastern District of Missouri.
 12 The other three Districts were where the defendant operates
 13 and are now preferred forums, at least preferable to
 14 Delaware, would be proper forums, but that is not what was
 15 argued for today.

16 So my focus is on the Eastern District of
 17 Missouri. And with respect to that District, the defendant
 18 has legitimate and rationale reasons for its preference.
 19 That is where they are physically located. It is clearly a
 20 more convenient forum for defendant than Delaware is. There
 21 are many witnesses located there. And the decisions that
 22 form the basis for plaintiff's claims evidently occurred in
 23 the Eastern District of Missouri. So that factor favors
 24 transfer.

25 In totality, it does not get the same weight as

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1 case where they sue a truly regional company that does
 2 business only in an area that does not include Delaware.

3 Here, I don't think the facts are in dispute,
 4 but the implication in my view is that the defendant is not
 5 a "truly regional company" in the sense that I think the
 6 cases are talking about, but it is maybe a quasi-regional
 7 company. It is not a company that as far as the record
 8 can indicate directs its business at a region that includes
 9 Delaware.

10 So what I understand is that as a matter of
 11 law, because we're talking about a regulated industry, the
 12 defendant is not allowed to market its services to Delaware
 13 residents. Nonetheless, if somebody who is a resident of one
 14 of those three states spends time in Delaware, perhaps an
 15 unlimited amount of time without being a resident of Delaware
 16 at the time they became a customer of the defendant, they can
 17 use the defendant's services in Delaware it appears as much as
 18 and as long as they want. It's also true that defendant does
 19 business with Delaware corporations, and it's also true that
 20 the defendant operates in multiple states, the three where it
 21 sells its services plus Missouri where it is located in and
 22 its headquarters are.

23 So we're not dealing with the mom-and-pop donut
 24 shop in North Carolina. We're not dealing with what the cases
 25 view as a truly regional company, but we're also not dealing

1 the plaintiff's choice of forum, but it does get significant
 2 weight.

3 Next, I turn to whether the claim arose elsewhere.
 4 That factor favors transfer. The claim did not
 5 arise in Delaware. It clearly arose at least in the three
 6 Districts where Clarity operates. It arguably also arose in
 7 the Eastern District of Missouri where the decisions leading
 8 to the lawsuit were made.

9 Next is the convenience of the parties.
 10 This factor, too, favors transfer to the Eastern
 11 District of Missouri. If the case were transferred there,
 12 there would be somewhat fewer miles for plaintiff to travel
 13 as plaintiff is located in and has offices only in California.
 14 Obviously, that is closer to the Eastern District of
 15 Missouri than is Delaware. And it would certainly be more
 16 convenient for the defendant which is already located in the
 17 Eastern District of Missouri.

18 Given the relative physical and financial
 19 conditions of the parties here, I don't believe that this
 20 factor, convenience of the parties, should get great weight,
 21 but what weight it gets favors transfer.

22 With respect to convenience of the witnesses, to
 23 the extent they're unavailable, there is no evidence that any
 24 witnesses are unavailable. I view this factor as neutral
 25 under the circumstances of this case.

1 Next, location of books and records.
 2 This factor slightly favors -- or favors Missouri
 3 but I give it very little weight given how I understand the
 4 books and records are kept and how they will be produced.
 5 Practical considerations.
 6 That factor also favors transfer but gets not
 7 too much weight here. I do think on the whole, this case
 8 will be easier and less expensive and more apt to resolve in
 9 the Eastern District of Missouri than here given the
 10 defendant is located there and the plaintiff really has no
 11 connection to Delaware.

12 Next, local interest.

13 This factor is neutral. Delaware does have an
 14 interest in its corporate citizens complying with the law,
 15 but the Eastern District of Missouri also has such an
 16 interest with respect to companies that operate in and are
 17 located in the Eastern District of Missouri.

18 The administrative difficulty factor got some
 19 attention in the briefing, none really today.

20 I view it as neutral. Clearly, our court is
 21 busy, but I don't view that as a real factor in this case.
 22 It's not a patent case. The parties seem to agree that
 23 the amount of work for the Court is likely to not be
 24 overwhelming, whichever Court has this case. So I don't
 25 view the administrative factor as pointing one way or the

1 basically for the reasons stated today, this case is being
 2 transferred.

3 Are there any questions or anything further we
 4 should talk about, defendant?

5 MR. JONES: No, Your Honor. I do thank you.

6 THE COURT: All right. And plaintiff?

7 MR. TOKE: No, Your Honor.

8 THE COURT: Okay. Thank you all very much. We
 9 will be in recess.

10 (Hearing ends at 1:28 p.m.)

11

12 I hereby certify the foregoing is a true and accurate
 13 transcript from my stenographic notes in the proceeding.

14 /s/ Brian P. Gaffigan
 15 Official Court Reporter
 16 U.S. District Court

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1 other in this case.

2 The other factors remaining, the remaining
 3 *Jumara* factors are neutral.

4 So where does this leave us? This leaves me
 5 with a very difficult decision, to be candid.

6 Clearly, there is a preponderance in favor of
 7 transfer. I think it is clear there is more than a
 8 preponderance of evidence in favor of transfer.

9 It's a tough question, particularly as I have
 10 analyzed the factors and have indicated it's not entirely
 11 clear, for instance, how much weight to give to the
 12 plaintiff's choice of forum.

13 The tough question is, is the balance heavily or
 14 strongly in favor of transfer? And that's a tough call.

15 But having given it a great deal of thought
 16 and doing the best I can, I ultimately conclude that the
 17 defendant has met its burden, and so I am going to grant
 18 the motion to transfer and send this case to the Eastern
 19 District of Missouri.

20 That means on the motion to dismiss, I am going
 21 to deny that as moot or deny it without prejudice. You all
 22 can fight about those issues in another court if you wish to
 23 do so. And, of course, that means the scheduling disputes
 24 that were also on the agenda for today are moot.

25 I'll issue an oral order that simply says

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